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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH F. MADDEN,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS; WILLIAM G. BERNARD, Individually and as General President of International Association of Heat & Frost Insulators & Asbestos Workers; JAMES A. GROGAN, Individually and as General Secretary/Treasurer of International Association of Heat & Frost Insulators & Asbestos Workers,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In light of this Court's landmark decision in *Sheet Metal Workers' International Assn. et al. v. Lynn*, 488 U.S. 347 (1989), do the protections accorded by Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") (29 U.S.C. §§411-415) apply to a duly elected local union officer who determines that there is substantially less dues owed by the local union to the international union than the international and its officers are claiming; who protests and objects to these claims for dues owed; who is subsequently threatened with removal from elected office if he does not pay on behalf of the local the claimed amounts to the international; who then pays the claimed amounts as directed, but under protest; yet, who is nevertheless removed from office by the international for not paying what was claimed to be owed?

II. Does evidence of pretext in a cause of action under Title I of the LMRDA for the retaliatory removal of an elected union official compel that the issue of retaliation be determined by a fact finder?

III. As expressly left undecided by this Court in *Sheet Metal Workers' International Assn. et al. v. Lynn*, 488 U.S. 347 (1989), does the retaliatory removal of an elected union official for exercising a Title I right violate §609 of the LMRDA (29 U.S.C. §529)?

IV. In a breach of contract claim under §301 of the Labor-Management Relations Act of 1947 ("LMRA") (29 U.S.C. §185) brought by a union member against the union for a violation of the union's constitution, must that union member demonstrate that the union's interpretation of the constitution is unreasonable or that the union acted in bad faith?

PARTIES

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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OPINIONS AND ORDERS BELOW

The Memorandum Order issued by the United States District Court for the Southern District of New York granting the Respondents summary judgment dismissing the Petitioner's complaint in its entirety has not been reported, but is reproduced in the Appendix at pages A-1 to A-5, *infra*. The Judgment of the same district court is reproduced in the Appendix at page A-6, *infra*.

The Summary Order issued by the United States Court of Appeals for the Second Circuit affirming the Order of the United States District Court for the Southern District of New York has not been reported, but is reproduced in the Appendix at pages A-7 to A-9, *infra*.

The Order of the United States Court of Appeals for the Second Circuit denying Kenneth F. Madden's petition for a rehearing with a suggestion for rehearing *in banc*, is not reported, but is reproduced in the Appendix at pages A-10 to A-11, *infra*.

JURISDICTION OF THIS COURT

The final judgment of the United States District Court for the Southern District of New York was entered on October 23, 1996. Notice of Appeal from said judgment was filed by the Petitioner on November 21, 1996. On June 10, 1997, the United States Court of Appeals for the Second Circuit affirmed the District Court's grant of summary judgment for the Respondents. On June 24, 1997, Kenneth F. Madden petitioned the United States Court of Appeals for the Second Circuit for rehearing with a suggestion for a rehearing *in banc*. By Order dated August 5, 1997 and filed on August 6, 1997, the United States Court of Appeals for the Second Circuit denied the petition for rehearing.

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in the case, the pertinent texts of which are set out in the Appendix at pages A-12 to A-17, *infra:*

Labor-Management Relations Act of 1947

Section 301 (29 U.S.C. §185)

Labor-Management Reporting and Disclosure Act of 1959

Section 3(j)(1) (29 U.S.C. §402(j)(1))
Section 101(a)(2) (29 U.S.C. §411(a)(2))
Section 101(a)(5) (29 U.S.C. §411(a)(5))
Section 102 (29 U.S.C. §412)
Section 609 (29 U.S.C. §529)

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction was conferred on the district court by the provisions of §§102 and 609 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA")(29 U.S.C. §412 and 529), and the provisions of §301 of the Labor-Management Relations Act of 1947 ("LMRA")(29 U.S.C. §185). Petitioner was a member of Regional Asbestos Abatement Local Union No. 201, which is an affiliate of Respondent International Association of Heat & Frost Insulators & Asbestos Workers, an unincorporated association, and a labor organization within the meaning of §3(j)(1) of the LMRDA (29 U.S.C. §402(j)(1)). Petitioner alleges that the Respondents unlawfully removed him from elected union office in violation of said statutory provisions.

II. Nature of the Case

On or about May 16, 1991, Petitioner Kenneth F. Madden was duly elected to the office of business manager/financial secretary of Regional Asbestos Abatement Local Union No. 201 ("Local 201"), which is an affiliate of the Respondent International Association of Heat & Frost Insulators & Asbestos Workers ("International"). Respondents William G. Bernard ("Bernard") and James A. Grogan ("Grogan") are the General President and General Secretary/Treasurer, respectively, of the International.

Foremost among Petitioner's duties as the elected officer of Local 201 was to represent the interests of the members of Local 201 with respect to the International. During the course of 1993, Petitioner determined that there existed a dispute between Local 201 and the International as to the number of

members within Local 201, and thus Local 201's past and present dues obligations to the International. Petitioner had determined that Local 201 had in actuality far fewer members than the International was claiming, and consequently owed the International far less in past and present dues than the International was claiming.

On or about August 12, 1993, Petitioner received a letter from Bernard, stating that Local 201 owed in excess of $150,000 to the International in unpaid dues, although the letter did not contain any basis upon which that amount had been determined. In this letter, Bernard directed the Petitioner to pay 25% of the prior indebtedness and all of the dues owed for 1993 within 30 days or Bernard would remove Petitioner from his elected office. (A-18–19)[1] Petitioner believed that Local 201's financial obligations to the International were at that time approximately only $60,000.

Bernard knew that Local 201 did not have the money to enable the Petitioner to comply with his directive, because he had been so advised by International Vice President James A. Amellin ("Amellin"). Amellin was at the time the International officer directly responsible for the geographic territory within which Local 201 operated.

At a membership meeting of Local 201 on August 26, 1993, Petitioner read for the members Bernard's letter to him dated August 12, 1993. He informed the members that Local 201's financial obligations to the International did not exceed $60,000, and that he would "fight this all the way." The members voiced their displeasures with, and mistrust of, the International, some going so far as to suggest that Local 201 get out of the International. A motion that Local 201 retain an attorney to address these problems was passed unanimously.

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[1] Appendices G-L are correspondence and a statement which were part of the record in the court below, and are appended hereto for the Court's convenience.

Under the threat of removal from his elected office, Petitioner made substantial payments to the International on behalf of Local 201. These payments amounted to in excess of $52,000. Included with one of these payments was a letter to Bernard dated September 10, 1993 (A-20–22), in which Petitioner reiterated Local 201's position regarding its financial obligations to the International. Petitioner stated to Bernard that he anticipated that an audit, which was in the process of being completed, would reveal that Local 201 may have overpaid its dues obligations to the International. He further stated that he expected that any such overpayments would be credited to future dues obligations.

By letter dated September 16, 1993 (A-23–24), Bernard acknowledged receipt of $40,153 from Local 201 since his letter of August 12, 1993. He stated that he and Grogan agreed that Petitioner had in general complied.

At another membership meeting of Local 201 on September 16, 1993, Petitioner informed the members that he had made the payments demanded by Bernard, but that doing so almost broke the Local. Once again, the members voiced their displeasure with the International and its officers. It was suggested by some members that since Grogan did not live up to his word with respect to certain promises given to Local 201, and did not properly recognize Local 201, that they should not pay dues to the International.

On October 1, 1993, Petitioner paid $10,000 to the International on behalf of Local 201 in further compliance with Bernard's directives.

By letter dated November 2, 1993 (A-25–27), Bernard removed Petitioner from his elected office of business manager/financial secretary of Local 201. In his letter of removal, Bernard charged Petitioner with: (1) improperly establishing a training and education fund; (2) improperly signing several checks on behalf of that fund; (3) improperly transferring money from that fund to the Local 201 general fund; and (4) consistently refusing to pay *per capita* dues to the International.

The letter did not mention the fact that in excess of $52,000 had been forwarded to the International on behalf of Local 201 since August 12, 1993. Moreover, this was the first written correspondence Petitioner had ever received from the International with respect to the training and education fund. Petitioner has maintained that Bernard's charges regarding this fund were pretextual, concocted to disguise the real reason for his removal.

A hearing was held on January 5, 1994, in which the hearing officer, appointed by Bernard, was to gather evidence on the charges against Petitioner as proffered by Bernard and forward that evidence to Bernard for consideration in his own determination as to whether his removal of Petitioner was warranted. Grogan appeared as the only witness at that hearing, without any prior notice to Petitioner. Petitioner read a statement (A-28–30) into the record in which he noted "[a] most significant factor that must be remembered by General President Bernard is that I am the *elected* spokesman of Local 201's members. I determined that a good faith dispute existed between Local 201 and the International as to the number of members in Local 201, and therefore as to the amount of per capita dues owed." (A-29) (emphasis in original).

Petitioner concluded his statement as follows:

> I believe that all of the allegations of wrongdoing against me are solely as a result of my speaking out against the International's claims for dues owed. I disputed the claims for dues owed in good faith, performing the job I was elected to do to the best of my ability. In return for my vocal and diligent representation of the members of Local 201, I have been removed from office, my reputation has been sullied, and, most importantly, Local 201 has been left without representation in this critical time of need. I can only assume that these charges against me and my removal from office are retaliatory in nature. (A-30)

On February 15, 1994, Petitioner received a letter from Bernard confirming his removal from elected office. (A-31–36) In this letter Bernard states:

> Your contention, that your removal was the result of your speaking out against the International's claims for dues owed, is simply wrong. The problem is not what you said, but what you did not do. You did not pay what you owed. (A-35)

The removal of Petitioner form his elected office of business manager/financial secretary of Local 201 was neither requested, authorized, nor ratified by any vote or action of the membership of Local 201.

Thereafter, Petitioner brought suit against the International as well as against Bernard and Grogan individually and as officers of the International. On October 12, 1994, Petitioner filed a complaint alleging, that on November 2, 1993, the Respondents unlawfully removed him from his position as the duly elected business manager/financial secretary of Local 201 in violation of §§101(a)(2), 101(a)(5), and §609 of the LMRDA; and in violation of §301 of the LMRA. The complaint further alleged that Respondents defamed Petitioner and caused him severe emotional distress under pendent state law claims.

Upon Respondents' motion, the United States District Court for the Southern District of New York (Hon. Jed S. Rakoff), granted summary judgment dismissing the complaint in its entirety. In a cursory opinion (A-1–5), the district court disposed of Petitioner's LMRDA claims as follows:

> 1. [Petitioner's] claim that he was removed from union office in violation of § 101(a)(2) of the [LMRDA], fails because [Petitioner] has not adduced admissible evidence showing a legally sufficient nexus between the exercise of his free speech rights and his removal from office. *See Mayes v. Operating Engineers Local*, 1995 WL 30576, at *25 (N.D.N.Y.), *aff'd*, 1995 WL 763004 (2d Cir. 1995).

> On its face, [Petitioner's] removal from office was the result of his failure to file the Local's monthly financial reports and membership status reports, his failure to pay the Local's union dues, and his mismanagement of the Local's education and training fund. While [Petitioner] may have complained about the International's position on these and related issues, he has failed to provide any admissible proof that his removal was in retaliation for, or in any causal way related to, his having so complained.
>
> 2. [Petitioner's] claim that his removal from office constituted unlawful "discipline" in violation of §609 of the [LMRDA] fails because "discipline" under §609 only encompasses actions that affect rights or status as a member of the union, not as an officer. *Finnegan v. Leu*, 456 U.S. 431, 437-38 (1982).
>
> 3. Likewise, [Petitioner's] claim that his procedural rights under §101(a)(5) of the [LMRDA], were violated in the process of his removal from office fails because "[§101(a)(5) does not refer to suspension of a member's status as an officer of the union." *Finnegan*, 456 U.S. at 437; *see also Depperman v. Local 1199 Union*, 1994 WL 225434, at *6 (S.D.N.Y. 1994).

(A-2). The district court also summarily disposed of Petitioner's claim under §301 of the LMRA as well as his pendent state law claims.

In affirming the district court's judgment, the United States Court of Appeals for the Second Circuit stated, without more, that it did so for "substantially the reasons stated by the district court in its memorandum order ..." (A-8)

REASONS FOR GRANTING CERTIORARI

Review by this Court is warranted because the Court of Appeals has affirmed a district court decision on questions of

critical importance to parties in civil labor law actions that conflicts with this Court's opinion in *Sheet Metal Workers' International Assn. et al. v. Lynn*, 488 U.S. 347 (1989). Prompt review is essential to provide needed guidance on (a) the protections afforded to elected union officials under the LMRDA; and (b) the proper burden upon a union member plaintiff in a breach of contract action against his union under §301 of the LMRA. The decision below is erroneous, and it improperly and summarily disposes of important issues concerning the democratic governance of labor unions.

I. THE COURT BELOW FAILED TO APPLY THIS COURT'S DECISION IN *SHEET METAL WORKERS V. LYNN*

In its brief opinion dismissing all of the Petitioner's claims, the court below never even mentioned, let alone applied, *Sheet Metal Workers v. Lynn*, *supra*. In *Lynn*, this Court held that the retaliatory removal of an elected union official violated Title I of the LMRDA. *Lynn*, *supra*, at 355. The union officer in *Lynn* was removed from his elected position as business representative because of his outspoken opposition to a proposed dues increase. *Lynn*, *supra*, at 350.

A. Petitioner's Removal from Elected Office was Retaliatory

In the instant case, it is undisputed that the Petitioner was an elected union officer and that he was subsequently removed from office. The applicability of *Lynn*, then, must hinge on whether Petitioner's removal from elected union office was retaliatory. The record demonstrates that it was.

Respondents have acknowledged that it was Petitioner's duty to represent the interests of Local 201 with respect to the International. During the course of 1993, a dispute developed between Local 201 and the Respondents regarding Local 201's financial obligation to the International. Respondents concede that Petitioner estimated this obligation to not exceed $60,000. Nevertheless, by letter dated August 12, 1993 (A-18–19), Bernard notified Petitioner that Local 201 must pay

the International an amount in excess of $150,000, and that he would remove Petitioner from his elected office if he did not begin to make substantial payments. Petitioner and the members of Local 201 were not provided with any documentation to substantiate the claimed amount. During his deposition, International Vice President James A. Amellin ("Amellin") conceded that it was Petitioner's job to dispute claims for dues owed by the International if Petitioner believed those claims to be incorrect or in error, and further conceded that Bernard knew that Local 201 did not have the financial wherewithal to comply with his demands.

When Bernard removed Petitioner from office *via* the letter dated November 2, 1993, he stated "[y]ou have consistently refused to pay the per capita dues owed by Local 201 to the International Union, except upon threat from removal from office." (A-26) That Petitioner, on behalf of Local 201, complained about the International's position regarding the dues owed, and protested the amounts claimed by the International, is never even mentioned in the letter. Later, when Bernard informed Petitioner *via* letter dated February 15, 1994, that his removal was warranted, he confirmed to Petitioner that he was removed because "you did not pay what you owed," again failing to mention the dispute as to what was owed. (A-35). It is also interesting to note that Bernard chose to personalize the disputed debt, attributing it to the Petitioner himself and not the local union he was elected to represent.

Thus, Bernard directed Petitioner, under the threat of removal, and with actual knowledge of his inability to comply, to pay to the International an amount nearly $100,000 more than Petitioner deemed due. Bernard held up the removal when Petitioner submitted under protest substantial payments towards the disputed amount. Later, Bernard ultimately made good on the threat, and actually removed the Petitioner for not paying the disputed amount. Petitioner's removal from elected office, then, was in retaliation for, at the very least, not complying with Bernard's directives regarding payment of the disputed amount. Petitioner maintains here, as he did below, that he in fact did comply under protest with Bernard's

specific payment directives. That Respondents characterize his compliance under protest as non-compliance is evidence that the reasons given for the removal were pretextual, an issue addressed more fully in the discussion of pretext *infra*.

B. Petitioner's Conduct is Protected

In its decision, the court below seemed to suggest that only the Petitioner's complaining about the International's position on the disputed issues was protected by Title I of the LMRDA. (A-2) Rather, in view of this Court's clear mandate in *Lynn*, it is the totality of Petitioner's conduct on behalf of Local 201 in disputing the International's claims, including complaining, protesting, withholding payment and giving payment under protest, that should be protected under Title I. This Court recognized that the Congressional intent behind the LMRDA to further democratic union governance required that union members be free to discuss union policies and criticize the leadership without fear of reprisal. *Lynn*, *supra*, at 355, *quoting*, *Steelworkers v. Sadlowski*, 457 U.S. 102, 112 (1982). This Court thus observed,

> "Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril. This is precisely what Congress sought to prevent when it passed the LMRDA." (Footnote omitted).

Lynn, *supra*, at 355.

Petitioner in the instant case was faced with a similar dilemma. Should he capitulate to Bernard's demands and turn over the treasury of Local 201 to the International, or should he do the job he was elected to do, resist Bernard's threats, and pay any amounts due only after proper determination? That Petitioner attempted to do the latter is precisely what is required to further democratic union governance. His diligent representation of the members who elected him should be protected, not punished.

If the decision of the court below is allowed to stand, then Congressional intent to further democratic union governance can be readily thwarted. Improperly motivated union officials, like Bernard and Grogan, can easily rid themselves of political and policy challenges from lower level and local union elected officers, such as the Petitioner. These improperly motivated officials merely have to give the challenging elected officer a directive that they know he either will not or cannot comply with. Object as he may, the challenging elected officer can still be removed. If only the officer's speaking out is protected, the improperly motivated union officials can insulate themselves from liability by offering pretextual reasons for the removal, such as failure to comply with the objected-to directive. It is unlikely that the improperly motivated union officials would ever acknowledge that the removal was in retaliation for the exercise of the protected activity, but would instead attribute it to some other unprotected activity. As Bernard informed the Petitioner, "[t]he problem is not what you said, but what you did not do. You did not pay what you owed." (A-35).

Petitioner's removal from his elected office for doing the very job he was elected to do contravenes the Congressional intent behind the LMRDA of furthering democratic union governance and is contrary to the protections afforded to elected union officials by this Court in *Lynn*.

II. EVIDENCE OF PRETEXT IN A CAUSE OF ACTION FOR THE RETALIATORY REMOVAL FROM ELECTED UNION OFFICE WARRANTS THAT THE ISSUE OF RETALIATION BE DETERMINED BY A TRIER OF FACT

The court below dismissed Petitioner's §101(a)(2) claim under the LMRDA by holding that Petitioner had "not adduced admissible evidence showing a legally sufficient nexus between his exercise of free speech rights and his removal from office[,]" citing *Mayes v. Operating Engineers Local*,

149 L.R.R.M. 2218, 2240 (N.D.N.Y.), *aff'd*, 1995 WL 763004 (2d Cir. 1995).

The opinion in *Mayes* was rendered after a seven-day bench trial in which nine witnesses testified. *Mayes*, *supra* at 2218. Moreover, that case did not involve the retaliatory removal of an elected officer. As such, *Mayes* could not offer proper guidance to a court deciding upon a summary judgment motion in a *Lynn*-type fact pattern.

The inquiry before the court below, then, was not whether there was a "legally sufficient nexus" between the exercise of Petitioner's free speech rights and his removal from office, but properly should have been whether Petitioner had put forth specific facts to put at issue the circumstances surrounding his removal, specifically the Respondents' retaliatory intent, motive and pretext. By apparently applying a trial standard of proof to a motion for summary judgment, the court below ignored the evidence of pretext submitted before it.

Petitioner put forth evidence showing that the reasons given for his removal were pretextual. Bernard was preparing to remove Petitioner prior to the expiration of the time he had given Petitioner to comply with his directives in the letter dated August 12, 1993. Bernard had General Counsel to the International draft a preliminary removal letter. This draft removal letter mentioned only the allegation relating to the disputed dues, and did not contain any of the allegations concerning the trust fund so suddenly prominent in the actual removal letter served on Petitioner barely six (6) weeks later. Respondents never ascertained whether the alleged violations for which Petitioner was removed were subsequently corrected. These specific facts put at issue whether the reasons proffered by the Respondents for removing Petitioner from elected office were pretextual, *post hoc* rationalizations to mask their unlawful retaliatory intent.

No trustee of the education and training fund (including International Vice President Amellin who was a trustee of the fund) ever objected, instructed or otherwise advised Petitioner

in any respect regarding the fund. Similarly, the Respondents' actions in removing Petitioner from elected office were never requested, authorized or ratified by any vote or action by the members of Local 201. A jury might wonder why there is no evidence that any of the other fund trustees or the members represented by Petitioner were dissatisfied. Other union officials also committed some of the acts of which Petitioner was accused, but only Petitioner was removed from office. A jury might also wonder why action was taken against Petitioner alone, if this "singling out" was causally related to his challenge of the International's claims. An employee of Local 201 with personal knowledge of virtually all of the facts and circumstances herein has stated under oath that the motivation behind Petitioner's removal was personal, improper and retaliatory.

Petitioner, who was given written directives by Bernard regarding payment of the disputed amount, paid on behalf of Local 201 in accordance with those directives, albeit under protest. Respondents acknowledged that, in general, Petitioner complied with those directives. That Petitioner had complied is further evidence that the specific reason given for his removal concerning the disputed amount was pretextual.

Thus, the record below was replete with evidence of pretext which the court below, perhaps misguided by inappropriately applying *Mayes*, ignored.

In employment discrimination cases, as in many other areas, a pretext inquiry is applied as a procedural safeguard. *Waters v. Churchill*, 511 U.S. 661, 690 (1994) (SCALIA, J., concurring). This is so because unlawful discrimination can be easily masked by *post hoc* rationalizations for the employment decision. Similarly, unlawful retaliatory intent can be easily masked by *post hoc* rationalizations for the removal of an elected union officer.

A pretext inquiry in an employment discrimination case permits the trier of fact to reject the proffered reasons for an employment decision and infer the ultimate fact of discrimination. Upon such rejection, no additional proof of

discrimination is required. *St. Mary's Honor Society v. Hicks*, 509 U.S. 502, 511 (1993). A pretext inquiry in an action for the retaliatory removal of an elected union officer should then permit the trier of fact to reject the proffered reasons for the removal and infer the ultimate fact of retaliation.

Therefore, if evidence of pretext can lead to a finding of pretext, and a finding of pretextuality permits the fact finder to reach the ultimate inference of retaliation, then evidence of pretext compels the issue of retaliation to be determined by a fact finder. Thus the court below erred by requiring Petitioner, who had submitted evidence of pretext, to submit evidence of retaliation to support his claim. A fact finder should have been permitted to resolve the disputed issues of fact, as well as the credibility determinations inherent in cases such as this where motive, intent and pretext are at issue.

III. THE RETALIATORY REMOVAL OF AN ELECTED UNION OFFICER FOR EXERCISING A TITLE I RIGHT VIOLATES §609 OF THE LMRDA AND MANDATES THAT THE PROCEDURAL SAFEGUARDS UNDER §101(a)(5) OF THE LMRDA BE AFFORDED THAT OFFICER

A. The Retaliatory Removal of Petitioner Violated §609.

The court below dismissed Petitioner's §609 claim under the LMRDA by holding that "'discipline' under §609 only encompasses actions that affect rights or status as a member of the union, not as an officer." In support of this ruling, the court below cited *Finnegan v. Leu*, 456 U.S. 431 (1982).

In *Finnegan* this Court rejected the plaintiff's §609 claim, holding that "removal from appointive union employment is not within the scope of those sanctions explicitly prohibited by §609." *Finnegan, supra* at 439. In its holding, this Court used the phrase "appointive union employment" and not the broader, more inclusive, term "union employment."

Seven years later, in *Sheet Metal Workers' International Assn. et al. v. Lynn*, 488 U.S. 347 (1989), this Court expressly considered the issue of the rights of *elected* union officials under the LMRDA, and distinguished those rights from those of *appointed* union officials. In *Lynn*, this Court expressly limited its holding in *Finnegan* to the removal of appointed union officials, specifically stating that in *Finnegan* it "did not consider whether the retaliatory removal of an elected official violates the LMRDA," and that it would then decide that issue in *Lynn*. *Lynn*, *supra* at 353.

While this Court did not specifically address whether Lynn's retaliatory removal from elected office violated §609 (because such a claim was not then before the Court), it once again deemed necessary to point out that *Finnegan* is expressly limited to the removal from "appointive union employment." *Lynn*, *supra* at 353 fn 5.

Petitioner, like Lynn, claims to have been retaliatorily removed from elected union office. In light of this Court's own clear limitation of *Finnegan* as expressed in *Lynn*, it is error to rely, as the court below did, upon *Finnegan* as authority for the proposition that the retaliatory removal of an elected union official does not state a cause of action under §609.

Consistent with the principles enunciated in *Lynn* and the policies underlying the LMRDA, it is respectfully urged upon this Court that the retaliatory removal of an elected union officer violates §609.

B. Denying Procedural Safeguards in the Retaliatory Removal of an Elected Union Officer Violates §101(a)(5).

The court below also dismissed Petitioner's §101(a)(5) claim under the LMRDA by holding that §101(a)(5) "does not refer to suspension of a member's status as an officer of the union." In support of this holding, the court below once again cited *Finnegan* as authority.

For the reasons discussed in the §609 analysis *supra*, this Court in *Lynn* limited its holding in *Finnegan* to the removal

of appointed union officials. *Lynn*, *supra* at 353. It was therefore error for the court below to apply *Finnegan*'s limited holding to the instant case involving the retaliatory removal of an elected official. Once again, in light of this Court's own clear limitation of *Finnegan* as expressed in *Lynn*, *Finnegan* cannot stand as authority for the proposition that the denial of procedural safeguards in the retaliatory removal of an elected union official does not violate §101(a)(5). If the retaliatory removal of an elected union official violates §101(a)(2), the denial of procedural safeguards in that removal should also violate §101(a)(5).

Once again, consistent with the principles enunciated in *Lynn* and the policies underlying the LMRDA, it is respectfully urged upon this Court that the denial of procedural safeguards in the retaliatory removal of an elected union officer violates §101(a)(5).

IV. A UNION MEMBER SUING HIS UNION FOR VIOLATING ITS CONSTITUTION IN A BREACH OF CONTRACT CLAIM UNDER §301 OF THE LMRA, NEED NOT SHOW THAT THE UNION'S INTERPRETATION OF ITS CONSTITUTION IS UNREASONABLE OR THAT IT ACTED IN BAD FAITH

The court below summarily dismissed Petitioner's claim under §301 of the LMRA on the ground that he had failed to demonstrate either that the union's interpretation of its constitution was unreasonable or that the union acted in bad faith.

It has long been established by the Supreme Court that a union constitution is a contract within the meaning of §301(a). *United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen*, 452 U.S. 615 (1981). At issue is whether the International, through the actions of its officers, Bernard and Grogan, violated the constitution and thereby committed a breach of contract actionable under §301 of the LMRA.

The court below relied upon *Association of Contracting Plumbers, Inc. v. Local Union No. 2*, 676 F.Supp. 523 (S.D.N.Y.), *aff'd*, 841 F.2d 461 (2d Cir. 1988), in imposing this two-pronged requirement. This case involved a jurisdictional dispute among an international union and its local(s), and did not involve the rights of an individual union member under the contract created by the constitution. Those situations involving conflicts between an international and its subordinate local unions under the union constitution are precisely the types of situations where deference to the union's interpretation of its constitution may be warranted. (*See*, *Association of Contracting Plumbers*, *supra* at 529). However, to extend that same deference to a situation, as in the instant case, wherein an individual union member sues the international union for a breach of the contract created by the union constitution yields the absurd result of permitting the accused breaching party (the international) to absolve itself of wrongdoing *via* its own "reasonable" interpretation of that contract.

Thus, the union's interpretation of its own constitution *vis a vis* Petitioner's breach of contract claim is irrelevant, and Petitioner should not have to show that such interpretation is unreasonable or that the International acted in bad faith, as these are issues properly to be determined by a fact finder.

Moreover, the evidence put forth by Petitioner showing that the reasons given for his removal were pretextual, put at issue whether those reasons were *post hoc* rationalizations to mask the Respondents' unlawful retaliatory intent. Also at issue, then, is the reasonableness of the Respondents' interpretation of the constitution (an interpretation that, not surprisingly, absolves them of any contractual liability to Petitioner).

This evidence of motive, intent, and pretext, puts at issue whether any of the actions undertaken by the Respondents pursuant to the authority granted to them by the constitution were undertaken pursuant to unlawful motivation or in bad faith. Just as Respondents cannot employ pretext to remove an officer for the color of that officer's skin, they similarly

cannot employ pretext to remove an officer for the exercise of that officer's federally guaranteed rights. Thus, if the proffered allegations of misconduct given by Respondents for removing Petitioner from office are pretextual, then Respondents never lawfully or properly possessed or exercised the removal powers granted by the constitution. The unlawful or improper exercise of those powers is a breach of the contract created by the constitution.

CONCLUSION

The summary dismissal of Petitioner's claims was in error, will discourage similarly-situated plaintiffs, and threatens the democratic integrity of internal union governance. This petition presents this Court with an opportunity to provide needed guidance on the protections afforded elected union officials necessary to accommodate the spirit and purpose of the LMRDA. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: October 31, 1997

Respectfully submitted,

THOMAS G. CARUSO*
JOHN M. DILLON
CARUSO & DILLON, P.C.
Attorneys for Petitioner
622 Rushmore Avenue
Mamaroneck, New York 10543

**Counsel of Record*

APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENNETH F. MADDEN, Plaintiff,	:	94 Civ. 7382 (JSR)
v.	:	*MEMORANDUM ORDER*
INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS; WILLIAM G. BERNARD; and JAMES GROGAN, Defendants.	:	

JED S. RAKOFF, U.S.D.J.

Plaintiff Kenneth Madden is the former Business Manager/Financial Secretary of Asbestos Abatement Local Union No. 201 (the "Local"), an affiliate of defendant International Association of Heat and Frost Insulators and Asbestos Workers (the "International"). He was removed from his union office by the International and thereafter brought this action against the International and two of its officers, International President William G. Bernard and International General Secretary/Treasurer James Grogan.

On July 31, 1996, defendants filed a motion for summary judgment on each of plaintiff's claims. Plaintiff, for his part, moved for summary judgment on one claim. Answering papers were filed by both sides, and oral argument was held on September 6, 1996. Upon full consideration, the Court grants summary judgment to defendants on all claims (and correspondingly denies summary judgement to plaintiff on his motion) for the following reasons:

1. Plaintiff's claim that he was removed from union office in violation of § 101(a)(2) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(2), fails because plaintiff has not adduced admissible evidence showing a legally sufficient nexus between the exercise of his free speech rights and his removal from office. *See Mayes v. Operating Engineers Local*, 1995 WL 30576, at *21 (N.D.N.Y.), *aff'd*, 1995 WL 763004 (2d Cir. 1995). On its face, plaintiff's removal from office was the result of his failure to file the Local's monthly financial reports and membership status reports, his failure to pay the Local's union dues, and his mismanagement of the Local's Education and Training Fund. While plaintiff may have complained about the International's position on these and related issues, he has failed to provide any admissible proof that his removal was in retaliation for, or in any causal way related to, his having so complained.

2. Plaintiff's claim that his removal from office constituted unlawful "discipline" in violation of § 609 of the LMRDA, 29 U.S.C. § 529, fails because "discipline" under § 609 only encompasses actions that affect rights or status as a member of the union, not as an officer. *Finnegan v. Leu*, 456 U.S. 431, 437-38 (1982).

3. Likewise, plaintiff's claim that his procedural rights under § 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5), were violated in the process of his removal from office fails because "[§ 101(a)(5) does not refer to suspension of a member's status as an officer of the union." *Finnegan*, 456 U.S. at 437; *see also Depperman v. Local 1199 Union*, 1994 WL 225434, at *6 (S.D.N.Y. 1994).

4. As to plaintiff's claim under § 301 of the LMRDA, 29 U.S.C. § 185(a), for violation of his rights under the union constitution, *see Wooddell v. Int'l Brotherhood of Elec. Workers Local 71*, 502 U.S. 93, 100-01 (1991), plaintiff fails to establish that defendants breached any duty owed him under the International Constitution. To prevail on a § 301 claim for breach of a union constitution, plaintiff must demonstrate

either that the union's interpretation of its constitution was unreasonable or that the union acted in bad faith. *Association of Contracting Plumbers, Inc. v. Local Union No. 2*, 676 F.Supp. 523, 530 (S.D.N.Y.), *aff'd*, 841 F.2d 461 (2d Cir. 1988).

As to the first prong, plaintiff has not adduced any admissible evidence that defendants unreasonably interpreted their general powers or duties to plaintiff under the International Constitution. On the contrary, in removing plaintiff as a local officer, defendant Bernard, as International President, acted pursuant to his clear and explicit authority, under Article VII, section 5(b) of the International Constitution, to remove any local union officer for failure to abide by his instructions. Such instructions included demands that plaintiff keep current on Local 201 dues, abide by the terms of the Education and Training Fund, and maintain and file accurate membership records, all of which plaintiff concededly failed to do. It was therefore within the Union's reasonable discretion under the International Constitution to remove plaintiff from office.

As to the second prong, while plaintiff hypothesizes all kinds of bad motives on the part of defendants, he has not come forward with admissible evidence to support these allegations. The law is clear that "[p]laintiff[ ] may not rely on conclusory allegations [and] must come forward with specific facts supporting [his] position." *Id.* at 533 (citing *Operative Plasters' and Cement Masons' Int'l Assoc. Local 202 v. Metropolitan N.Y Dry Wall Contractors Assoc.*, 543 F.Supp. 301, 311-12 (E.D.N.Y. 1982)). Here as elsewhere, plaintiff's failure to do so is fatal to his claim.

Finally, plaintiff alleges that defendants violated Article XXIV, section 1 of the Constitution, which sets forth various obligations owed by individual union members to one another. While plaintiff entirely fails to specify those aspects of Article XXIV, section 1 on which he purports to rely to support his § 301 claim, he has, in any event, not advanced any admissible evidence showing that the complained-of actions

of the defendants were unreasonable under any part of this section.

5. Plaintiff's claim that defendants defamed him by publishing his letter of removal in the union newsletter also fails. In his pleadings and written submissions, plaintiff failed to identify any statements or portions of the published letter that could be reasonably susceptible to a defamatory meaning. When repeatedly pressed to do so at oral argument, counsel largely pointed to conclusory opinions or to statements of uncontested or immaterial facts. The law is clear that if statements are "not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." *Kirkland v. City of Peekskill*, 634 F.Supp. 950, 953 (S.D.N.Y. 1986) (quoting *Aronson v. Wiersma*, 65 N.Y.2d 592, 593-94 (1985)). Conclusory opinions are likewise non-actionable. *See Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-90 (1986).

Moreover, even if the letter were considered defamatory, plaintiff is a public figure in the union community, *see Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980), *cert denied*, 450 U.S. 1041 (1981); *Guam Federation of Teachers v. Ysrael*, 492 F.2d 438, 439 (9th Cir.), *cert denied*, 419 U.S. 872 (1974), who must therefore establish malice by the defendants in order to prevail on his claim. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967). Plaintiff has not adduced "clear and convincing" evidence of malice in the publication of his removal letter, and his claim must therefore fail for this additional reason. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

6. Finally, plaintiff's claims for either negligent or intentional infliction of emotional distress must fail. Plaintiff fails to point to any conduct by defendants that is "so outrageous in character, and so extreme in degree" as to arguably constitute a claim for intentional infliction of emotional distress. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 303 (1983). Plaintiff also fails to demonstrate any conduct by defendants that could have unreasonably endangered the

safety of plaintiff or put him in fear of his life. *See Buckley v. Metro North Commuter R.R.*, 79 F.3d 1337, 1343 (2d Cir. 1996); *Cucchi v. New York City Off-Track Betting Corp.*, 818 F.Supp. 647, 656 (S.D.N.Y. 1993).

For the foregoing reasons, the defendants' motion for summary judgment is granted in its entirety and plaintiff's motion for partial summary judgment is denied. Clerk to enter judgment.

SO ORDERED.

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

Dated: White Plains, New York
October 21, 1996

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Kenneth F. Madden,	:	94 CIVIL 7382 (JSR)
Plaintiff,	:	JUDGMENT
-against-	:	
International Association of Heat and Frost Insulators and Asbestos Workers; William G. Bernard; and James Grogan,	:	U.S. DISTRICT COURT FILED W.P. OCT 23 1996 S.D. OF N.Y.
Defendants,	:	

Defendants having moved to dismiss and the said motion having come before the Honorable Jed S. Rakoff, United States District Judge and the Court thereafter on October 21, 1996, having handed down its Memorandum order granting defendants motion for summary judgment in its entirety and plaintiff's motion for partial summary judgment is denied, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as to all defendants.

Dated: White Plains, New York
October 23, 1996

/s/ James Parkison
Clerk

/s/ E. M[?]

DEC 31 1996

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of June, one thousand nine hundred and ninety-seven.

PRESENT:

ELLSWORTH A. VAN GRAAFEILAND,
ROGER J. MINER,
JOSÉ A. CABRANES,
Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JUN 10 1997
GEORGE LANGE III,
CLERK

KENNETH F. MADDEN,

Plaintiff-Appellant,

No. 96-9528

v.

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS, WILLIAM G. BERNARD, Individually and as General President of International Association of Heat & Frost Insulators & Asbestos Workers, JAMES A. GROGAN, Individually and as General Secretary/Treasurer of International Association of Heat & Frost Insulators & Asbestos Workers.

Defendants-Appellees.

APPEARING FOR APPELLANT:

THOMAS G. CARUSO, Caruso & Dillon (John M. Dillon, on the brief), Mamaroneck, New York.

APPEARING FOR APPELLEES:

ROBERT D. KURNICK, Sherman, Dunn, Cohen, Leifer & Yellig (Martin J. Crane, on the brief; Vladeck, Waldman, Elias & Engelhard, New York, New York, of counsel), Washington, D.C.

Appeal from the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge).*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Appellant claims that the district court erred in (i) dismissing his claims under sections 102 and 609 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 412 and 529; (ii) dismissing his claim for breach of contract under section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185; and (iii) dismissing his claim, under New York state law, for defamation.

We affirm the judgment of the district court for substantially the reasons stated by the district court in its memorandum order dated October 21, 1996. *See Madden v. International Ass'n of Heat & Frost Insulators & Asbestos Workers,* 94 Civ. 7382 (JSR) (S.D.N.Y. Oct. 21, 1996). We have considered all of appellant's claims on appeal and find them to be without merit.

Accordingly, the order of the District Court is AFFIRMED.

/s/ Ellsworth Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

/s/ Roger Miner
ROGER J. MINER, U.S.C.J.

/s/ José Cabranes
JOSÉ A. CABRANES, U.S.C.J.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5 day of August one thousand nine hundred and ninety-seven.

Madden

Plaintiff-Appellant

v

Dkt No: 96-9528

Intnl. Assoc. of HEA

Defendant-Appellee

UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT

FILED

AUG 6 1997

GEORGE LANGE III,
CLERK

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Kenneth Madden.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p O ccc
inbancdn_frm

Appendix E

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

§411. Bill of rights; constitution and bylaws of labor organizations

(a) (1) *Equal rights*. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) *Freedom of speech and assembly*. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) *Dues, initiation fees, and assessments*. Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act [enacted Sept. 14, 1959] shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (I) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (I) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) *Protection of the right to sue.* No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly

finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) *Safeguards against improper disciplinary action.* No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) *Invalidity of constitution and bylaws.* Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

(Sept. 14, 1959, P. L. 86-257, Title I, §101, 73 Stat. 522.)

§ 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this title [29 USCS §§411 et seq.] have been infringed by any violation of this title [29 USCS §§411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Sept. 14, 1959, P. L. 86-257, Title 1, §102, 73 Stat. 523.)

* * *

MISCELLANEOUS PROVISIONS

* * *

§ 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor

organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. [29 USCS §§401 et seq.] The provisions of section 102 [29 USCS §412] shall be applicable in the enforcement of this section.

(Sept. 14, 1959, P. L. 86-257, Title VI, §609, 73 Stat. 541.)

* * *

Appendix F

LABOR-MANAGEMENT RELATIONS ACT OF 1947

* * *

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§185. Suits by and against labor organizations

(a) *Venue, amount, and citizenship.* Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) *Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.* Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) *Jurisdiction.* For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) *Service of process.* The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) *Determination of question of agency.* For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, ch 120, Title III, §301, 61 Stat. 156.)

Appendix G

INTERNATIONAL ASSOCIATION OF
Heat & Frost Insulators
& Asbestos Workers

William G. Bernard, General President
James A. Grogan, General Secretary/Treasurer

Suite 301
1776 Massachusetts
Avenue, N.W.

Washington
D.C. 20036-1989

202-785-2388
Fax: 202-429-0568

Office of the General President

Affiliated with the AFL-CIO,
Building and Construction
Trades Department, Metal
Trades Department and
Canadian Federation of Labour

August 12, 1993

Kenneth Madden
Abatement Local 201
P.O. Box 128
Tarrytown, NY 10591

Dear Ken:

As you will recall, on February 18, 1993 General Secretary-Treasurer James A. Grogan met with you, International Vice President James Amellin, and others in Wallingford, Connecticut to review and discuss Local 201's financial records. Those records showed that, as of that date, Local 201 owed approximately $140,000 to the International Union in unpaid dues. At that meeting Secretary-Treasurer Grogan instructed you to begin paying that indebtedness and to pay in a timely fashion all dues owed for 1993 so that the indebtedness would not increase.

You did not comply with Secretary Grogan's instructions. You have not paid any part of the indebtedness or any of the dues owed for 1993. As of today, the local's indebtedness appears to be over $150,000. Your failure to pay any part of that

amount violated your obligations under the Constitution, contravened the instructions that you received from Secretary-Treasurer Grogan, and irresponsibly placed the well-being of Local 201 in jeopardy.

Under Article VII, Section 5(b) of the International Association's Constitution and Bylaws, I have the authority to remove or suspend any local union officer who fails to comply with the Constitution and Bylaws or fails to carry out an instruction received from the General President, General Secretary-Treasurer, or General Executive Board. I am writing to instruct you to pay Local 201's indebtedness to the International Union. I am also notifying you that if within 30 days you do not pay all of the dues owed for January through July, 1993 *and* at least 25% of the prior indebtedness, *and* then continue to make regular payments reducing that indebtedness until it is eliminated, I will invoke my authority under Article VII, Section 5(b) to remove you from office and appoint a replacement. I sincerely hope that such action will not be necessary.

With kind regards, I remain

Sincerely and fraternally,

/s/ William G. Bernard

William G. Bernard
General President

WGB/mgm

cc: IVP James Amellin, New York-New England Conf.
President Brian Leclerc, Local 204

Madden
63
5/11/92

Appendix H

International Association of Heat and Frost Insulators & Asbestos Workers

Local No. 201 City TARRYTOWN State NY

Address P.O. BOX 128, TARRYTOWN, NY 10591

September 10, 1993

Sent via Federal Express

Mr. William G. Bernard, General President
International Association of Heat & Frost Insulators & Asbestos Workers
1776 Massachusetts Ave., N.W., Suite 301
Washington, D.C. 20036-1989

RECEIVED
SEP 13 1993
via Fed. Express

Dear Mr. Bernard:

I am in receipt of your letter of August 12, 1993 demanding payment for past dues from Asbestos Workers Local 201.

According to that letter, your records indicate that Local 201 owed approximately $140,000.00 in pre-1993 dues, and additional dues from January 1 through July 31, 1993, and you have demanded payments by September 12, 1993 of 25% of the pre-1993 dues as well as all of the dues owed for the period of January 1 through July 31, 1993. I am enclosing a check for $20,153.00 which, according to our records, is in full compliance with this demand.

Based on our calculation of the maximum possible number of Local 201 members, we calculate the amount due as follows:

$140,000.00 x 25%	= $35,000.00
Dues from 1/1/93 to 8/1/93	= $14,053.00
Total	= $49,053.00
Payments made to date (copies of checks enclosed)	<$28,900.00>

Total due = $20,153.00

Affiliated with the AFL-CIO,
Building and Construction
Trades Department,
Metal Trades Department, and
Canadian Labour Congress

Madden
68
5/1/96

CK#12670:
DTD 9-10-93
$20,153.00
DEPOSITED
9-13-93

As you are aware, for periods in 1991 and 1992, Local 201 was operating under the jurisdiction of Local 12 and/or the International. Moreover, for periods in 1993 a portion of the Local has been operating under the jurisdiction of Local 12 Abatement. Because of this the membership roster of Local 201 is inaccurate and inflated. Accordingly, please note, we are presently conducting an audit of the membership rosters of Local 201 for 1991, 1992 and 1993. I believe that this audit will demonstrate that the amount due the International is substantially less for 1991, 1992 and 1993 than the records of the International show.

Additionally, it is our understanding that the International Association has provided relief of per capita dues tax for inactive members. We have not adjusted the amounts calculated as due for such relief. Furthermore, we understand dues are to be paid only on funds actually collected from employers. The amounts remitted, pursuant to this letter, for 1991 and 1992 have also not been adjusted for uncollected amounts.

Once we have completed our audit of the membership roster and have determined the number of inactive members and uncollected funds, I will forward these figures to you. We will continue to make payments of the balance due in a timely fashion. However, we anticipate that to the extent our audit reveals that overpayments of dues have been made by Local

201, such payments will be credited to our future dues obligation.

Sincerely and Fraternally Yours,

/s/ Kenneth F. Madden

Kenneth F. Madden
Business Manager
Local 201

cc: IVP James Amellin, NY-NE Conference President Brian Leclerc, Local 201

Appendix I

INTERNATIONAL ASSOCIATION OF
Heat & Frost Insulators
& Asbestos Workers

William G. Bernard, General President
James A. Grogan, General Secretary Treasurer

Suite 301
1776 Massachusetts
Avenue, N.W.

Washington
D.C. 20036-1989

202-785-2388
Fax: 202-429-0568

Office of the General President

Affiliated with the AFL-CIO,
Building and Construction
Trades Department, Metal
Trades Department and
Canadian Federation of Labour

September 16, 1993

Mr. Kenneth Madden
Asbestos Workers Local 201
One Central Ave., #302
P.O. Box 128
Tarrytown, NY 10591

Dear Sir and Brother:

General Secretary-Treasurer Jim Grogan has informed me that you have sent checks in the amount of $40,153.00 since my letter of August 12th. Although he has some reservation on the current 1993 amount, he agrees you have, in general, complied.

This is to inform you that you must stay current with your monthly reports. In addition, on your past debt the General office expects $10,000.00 on the first of each month starting with October 1, 1993.

General Secretary-Treasurer Grogan will be contacting you shortly, if he has not already, to review Local 201's account. Your cooperation, as always, is expected.

Sincerely and fraternally,

/s/ William G. Bernard

William G. Bernard
General President

[illegible text]

Appendix J

INTERNATIONAL ASSOCIATION OF
Heat & Frost Insulators
& Asbestos Workers

William G. Bernard, General President
James A. Grogan, General Secretary/Treasurer

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1776 Massachusetts
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Office of the General President

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Building and Construction
Trades Department, Metal
Trades Department and
Canadian Federation of Labour

November 2, 1993

Kenneth Madden
P.O. Box 128
Tarrytown, NY 10591

Dear Sir and Brother:

As you are aware, during the last several weeks there have been several meetings, discussions, and exchanges of correspondence, in which you have participated, about the administration of Local Union 201 and your performance as business manager/financial secretary of that Local Union. A number of serious problems have arisen, as you know, because you have not complied with the law or with the Constitution and By-laws of this union.

You established a training and education fund with employer contributions, but did not establish a join trust fund in the manner required by Section 302(c)(6) of the National Labor Relations Act, although you were advised several times of the necessity of doing so. You signed several checks on behalf of the training and education fund without receiving the appropriate authorization to do so from the fund's trustees. You

transferred money from the training and education fund to Local 201's general fund, to pay for part of your salary as business manager of Local 201 and, it appears, to pay part of Local 201's indebtedness to the International Union for per capita dues. That transfer violated Section 408(c)(2) of ERISA, which prohibits the payment of compensation, other than reimbursement for actual expenses, to full-time union officers and may also have constituted a breach of your duty as a fiduciary of the fund.

You have consistently refused to pay the per capita dues owed by Local 201 to the International Union, except upon threat of removal from office. In my letter to you of August 12, 1993, I told you that in addition to paying 25% of Local 201's indebtedness, you would have to make regular payments reducing the indebtedness until it was eliminated. You have not made those payments. And, in fact, you failed to make the payments due for August and September 1993 until Secretary-Treasurer Grogan specifically instructed you to do so.

I have concluded that the problems in Local 201 cannot be corrected as long as you are serving as the business manager/financial secretary. Under Article VII, Section 5(b) of the Constitution and Bylaws, I have the authority to remove or suspend any local union officer, representative or agent for "any failure to carry out the provisions of the International Constitution and Bylaws, or for failure to observe or carry out all lawful decisions or instructions of the General President, General Secretary-Treasurer or General Executive Board." By failing to establish and administer Local 201's training and education fund in a lawful manner and by failing to pay Local 201's indebtedness to the International Union, you have violated your obligations as the business manager/financial secretary of Local Union 201, contravened specific and lawful directives from General Secretary-Treasurer Grogan and from me, and placed the welfare of Local Union 201 in jeopardy.

I am, therefore, removing you from the office of business manager/financial secretary of Local Union 201, effective immediately. I am also removing you, effective immediately,

from your position as organizer for Local Union 12-A. I am appointing as your successor at Local 201, International Vice President James Amellin, who will serve as business manager/financial secretary until a successor is either appointed or elected. Your suspension is not intended to limit the autonomy of Local Union 201 or the rights of its members.

Pursuant to Article VII, Section 5(b) of the Constitution and Bylaws, I am directing International Vice President Jack Keane to conduct a hearing on whether your removal is warranted and should be continued. He will notify you shortly of the time and location of that hearing.

Sincerely and fraternally,

/s/ William G. Bernard

William G. Bernard
General President

WGB/mgm

cc: IVP Jack Keane

Appendix K

EXHIBIT I

Madden
81
5/1/96

Dear Sirs and Brothers:

I would like to begin my remarks today by voicing some objections regarding these proceedings. First of all, given the serious nature of the allegations against me, I find it disturbing that the General President refuses to allow my attorneys to participate in this hearing. Secondly, I am concerned with the hearing officer's potential lack of impartiality, since he was designated by the General President, who is the very individual preferring the charges against me. Thirdly, as of the start of this hearing no *specific* charges have ever been articulated, which obviously makes defending myself difficult if not impossible. However, I will answer the allegations contained in General President Bernard's letter to me dated November 2, 1993, which, as we all know, was published in its entirety in the current "Journal".

General President Bernard alleges that I established a training and education fund with employer contributions, but did not establish a joint trust fund as required by law. The trust fund in question was validly established with a duly executed trust agreement. I have a copy of this agreement available for the hearing officer. I am unaware of any improprieties in the formation of this trust fund. Furthermore, I am only one of at least ten individuals who jointly created this trust fund. Why am I the only one being falsely accused here today?

General President Bernard further alleges that I signed several checks from the training and education fund without appropriate authorization from the fund's trustees. As a trustee and the fund administrator, it was my duty to remit payment for expenses which were properly incurred by the fund. All other trustees, including Jim Amellin, Bob Starr, and Gene LeClerc, were aware of, and have never objected even to this day, to any of these payments of expenses. Other individuals have signed checks an behalf of the trust fund, yet again I am the only one accused here today. Furthermore, all monies are

properly accounted for, so any violation, to the extent that one may even exist, is merely technical in nature, which leads to the greater question: Why am I being singled out this way?

General President Bernard's next allegation is that I transferred money from the training and education fund to pay for part of my salary as business manager of Local 201 and part of Local 201's indebtedness to the International Union, in violation of Section 408(c)(2) of ERISA. Any payments from the training and education fund to Local 201's general fund were solely for properly invoiced legitimate expenses, part of which was my time spent working for the training and education fund. The training and education fund was merely reimbursing Local 201's general fund for the cost of my time, since any compensation I received was *only* from the Local 201 general fund, and *never* from the training and education fund. At *no time* did I ever receive more than my business manager's salary, plus actual expenses. Furthermore, Local 43's general fund was reimbursed in the same manner for time that it's business manager, Bob Starr, who is also a fund trustee, spent working for the fund. All other trustees were aware of these practices. Again, why am I the only individual being accused of wrongdoing here today?

Finally, General President Bernard alleges that I consistently refused to pay per capita dues owed by Local 201 to the International Union. A most significant factor that must be remembered by General President Bernard is that I am the *elected* spokesman of Local 201's members. I determined that a good faith dispute existed between Local 201 and the International as to the number of members in Local 201, and therefore as to the amount of per capita dues owed. This was brought to the attention of Vice President Jim Amellin, as per the procedures outlined in the Union Constitution and Bylaws. After consulting with Mr. Amellin, we agreed that, given the transfer of many of Local 201's members to the newly forming Local 12A, it would be impossible to accurately determine the current and active membership of Local 201 (and therefore the per capita dues owed the International).

It was agreed that any payments would be held in abeyance pending the results of a membership audit, which was begun.

I believe that all of the allegations of wrongdoing against me are solely as a result of my speaking out against the International's claims for dues owed. I disputed the claims for dues owed in good faith, performing the job I was elected to do to the best of my ability. In return for my vocal and diligent representation of the members of Local 201, I have been removed from office, my reputation has been sullied, and, most importantly, Local 201 has been left without representation in this critical time of need. I can only assume that these charges against me and my removal from office are retaliatory in nature.

Dated: January 5, 1994
Tarrytown, New York

/s/ Kenneth F. Madden
Kenneth F. Madden

Appendix L

INTERNATIONAL ASSOCIATION OF
Heat & Frost Insulators
& Asbestos Workers

William G. Bernard, General President
James A. Grogan, General Secretary/Treasurer

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Office of the General President

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Building and Construction
Trades Department, Metal
Trades Department and
Canadian Federation of Labour

February 15, 1994

Mr. Kenneth Madden
156 Tibbets Road
Yonkers, NY 10705

Dear Sir and Brother:

By letter dated November 2, 1993, I removed you from the office of business manager and financial secretary of Local Union 201, pursuant to Article VII, Section 5(b) of the Constitution and Bylaws. At that time, I directed International Vice President Keane to conduct a hearing on whether your removal was warranted and whether it should continue. Vice President Keane attempted to conduct that hearing on December 3, 1993 in Local 201's office. On that date, because Vice President Keane would not permit your attorneys to attend and represent you, you refused to participate in the hearing, and Vice President Keane closed the hearing without taking any evidence. I subsequently directed Vice President Keane to reopen the hearing and take evidence, regardless of whether you were willing to participate. By letter dated December 17, 1993, I informed you that the reopened hearing was scheduled for January 5, 1994, in the offices of Local Union 201, and I

invited you to attend and present evidence in your own defense.

That hearing did take place on January 5, 1994. You attended and participated. Your attorneys were excluded from the hearing room, although you were permitted to recess the hearing at any time to consult with them. I note that you offered testimony on your own behalf and cross-examined the witness who testified against you, but you adamantly refused to be cross-examined or questioned by the hearing officer. I have reviewed the tape recording of that hearing and the documents offered as exhibits. I am writing you now to inform you of my decision.

At the hearing you raised three procedural objections: 1) that your attorneys were excluded from the hearing; 2) that the hearing officer was not impartial because I had appointed him; and 3) that the charges against your were not sufficiently specific. I find each objection to be without merit.

The policy of this union is that attorneys may not represent either side in internal union hearings. My view is that such hearings should be informal and that the presence of attorneys would only complicate the process, making participation difficult, if not impossible, for those members who cannot afford to hire attorneys.

Although you objected to the fact that I appointed the hearing officer, Article VII, Section 5(b) provides that, when an officer is removed from office, the hearing must be conducted either by the General President or by "a hearing officer designated by the General President." Accordingly, in appointing the hearing officer, I was merely following the procedure mandated by the Constitution. You should note that the role of the hearing officer is merely to collect evidence and transmit it to me. The decision in this matter is mine and mine alone.

I have reexamined my letter to you of November 2, 1993, which describes the reasons for your removal from office. I am satisfied that the letter is sufficiently specific and

describes in adequate detail the conduct and circumstances that led to your removal.

Moreover, the evidence produced at the hearing convinces me that your removal from office was warranted. That evidence shows that you created an education and training fund for the members of Local 201, but operated the fund in a manner that violated the law, violated the trust agreement, and violated specific directives from the General Secretary-Treasurer. Although the law requires all joint trust funds to have an equal number of union and management trustees, the education and training fund had 4 union trustees and only 2 management trustees. The trust agreement provides that all checks must be signed by one union and one management trustee. Yet many of the fund's checks were signed only by you. Other checks were signed by you and another union trustee, and others were signed by you and the Local Union President, who is not a trustee.

You also used the assets of the education and training fund to pay your own salary as business manager and financial secretary of Local Union 201, a practice prohibited by law. At the hearing, you claimed that these payments were reimbursement for services that you had performed for the fund, but there is no evidence that you performed any services for the fund, other than your duties as trustee. Large sums were also paid from the fund to the Local Union purportedly as reimbursement for rent, accounting services and clerical services, all without any approval from the fund's trustees.

When General Secretary-Treasurer Grogan discovered these practices, he directed you not to sign any more checks without the proper signatures and not to pay any more of the fund's money to the Local Union. He also directed you to call a meeting of the trustees to insure that the trust fund was properly operated. You not only ignored his directives, you also fabricated a story about obtaining approval to sign checks from the fund's attorney and the other trustees, a story that the attorney and all of the trustees denied.

The report from the fund's attorney, which was introduced as an exhibit, shows that your conduct jeopardized not only the fund, but the treasury of the Local Union, which may be required to return, with interest, all reimbursement payments received from the fund, and pay a substantial tax.

At the hearing, you did not deny signing the improper checks or making the improper payments. You claimed, however, that since many other people knew what you were doing, you were being unfairly singled out. It seems to me, however, that your role in this matter is unique. You were responsible for appointing the union trustees. You are the only individual who signed all of the improper checks. You not only made improper payments from the fund to the Local Union, but as business manager and financial secretary of the Local Union, you accepted payments on behalf of the Local that you knew, or should have known, were improper. And, you are the individual who ignored specific directives from the General-Secretary Treasurer. I am not persuaded that your improper conduct is excused by the fact that others knew that you were acting improperly.

The record of the hearing convinces me that your removal from office is also justified by your persistent refusal to pay the dues owed by Local Union 201 to the International. As of February 1993, when Secretary-Treasurer Grogan met with you and your local union's accountant and fund administrator, Local 201 owed over $140,000 to the International. At that time, Secretary-Treasurer Grogan told you that the International would hold that amount in abeyance, but that you were to make all payments due for 1993 in a timely manner. Despite that directive, you paid nothing until I sent you a letter in August instructing you to pay part of the Local's indebtedness or face removal. I sent you another letter in September 1993 instructing you to pay $10,000 per month to reduce the Local's indebtedness and to pay all future dues in a timely manner. You paid the $10,000, but did not pay the Local's monthly dues in a timely manner.

At the hearing, you attributed your failure to pay dues to uncertainty about the number of members in Local Union 201 after the formation of Local 12A, into which some of your members transferred. Local 12A was chartered on May 18, 1993. You offer no excuse for the fact that after General Secretary-Treasurer Grogan directed you in February to remain current in your dues, you paid nothing whatsoever in February, March, or April. And, any uncertainty about the precise number of members in Local No. 201 after May does not excuse the fact that you paid nothing until you were threatened with removal in August and even then did not pay in a timely manner. Your contention, that your removal was the result of your speaking out against the International's claims for dues owed, is simply wrong. The problem is not what you said, but what you did not do. You did not pay what you owed.

Under Article VII, Section 5(b) of the Constitution and Bylaws, I have the authority to remove a local union officer for failure to carry out the provisions of the International Constitution and Bylaws or the instructions of the General President or the General Secretary-Treasurer. The record of the hearing shows that you ignored directives from me and from Secretary-Treasurer Grogan regarding the operation of the education and training fund and the payment of dues. The records also show that your mismanagement of the fund -- including your acceptance on behalf of the Local Union of money improperly paid from the fund -- and your failure to pay dues owed by the Local Union constitutes a failure to carry out your obligations under the Constitution and Bylaws. Accordingly, it is my decision that your removal from office was warranted and should continue for the remainder of your term of office.

This decision is not intended to interfere with your ability to obtain employment or your right to participate, as a member, in the affairs of Local Union 201. This decision may be appealed to the General Executive Board, but a notice of appeal must be filed with the General Secretary-Treasurer within 30 days of the date of this decision.

Fraternally yours,

/s/ William G. Bernard

William G. Bernard
General President

WGB/sjf